



JUDICIAL INVESTIGATION COMMISSION

WV Judicial Tower - Suite 700 A
4700 MacCorkle Ave., SE
Charleston, West Virginia 25304
(304) 558-0169

January 18, 2023

Re: JIC Advisory Opinion 2023-01

Dear Judge :

Your request for an advisory opinion to Counsel was recently reviewed by the Judicial Investigation Commission. The factual scenario giving rise to your request is as follows: You will soon preside over a criminal trial involving a defendant who is presently incarcerated. If convicted, the State intends to file a recidivist information against the defendant before the end of the term which concludes on January 31, 2023. You believe that while you were prosecuting attorney you prosecuted the defendant on one or more of the prior felony convictions that would be included in the recidivist information. You have indicated a belief that he must be arraigned in current term but can be tried in the next term.

You do not plan to preside over the recidivist trial because of the former cases that would be included in the information. However, you want to know if you can arraign the defendant on the charges prior to the conclusion of the term. It is your belief that the defendant must be arraigned in the same term as when the information is filed. You are also concerned that because the end of the term is so near it might be difficult to get a special judge since the individual who covers conflicts in your county is on vacation and the matter will need to go before the Chief Justice for reassignment.

To address your questions, the Commission has reviewed Rule 2.11 of the Code of Judicial Conduct which states:

Rule 2.11 Disqualification

- (A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: . . .
 - (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding. . . .
 - (5) The Judge: (a) served as a lawyer in the matter in controversy. . . .

Comment 2 to Rule 2.11 notes that “[a] judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.” Comment 5 states that “[a] judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.”

When a question of disqualification arises, an analysis must be made of when a current or former relationship causes a reasonable questioning of a judge's impartiality. In *State ex rel. Brown v. Dietrick*, 191 W. Va. 169, 444 S.E.2d 47 (1994), the Court considered whether the circuit court was correct in holding that a search warrant issued by a magistrate was void because the magistrate was married to the Chief of Police and one of his officers had obtained the warrant. The Court held that in any criminal matter where the magistrate's spouse was involved the magistrate would be disqualified from hearing that matter. The Court declined to extend a *per se rule* to other members of the police force. The fact that the magistrate's spouse was the chief of police of a small agency did not automatically disqualify the magistrate who could be otherwise neutral and detached from issuing a warrant sought by another member of the police force.

In *Tennant v. Marion Health Care Foundation*, 194 W. Va. 97, 459 S.E.2d 374 (1995), the Court held that a judge should disqualify himself or herself from any proceeding in which his impartiality might reasonably be questioned. The Court noted that the avoidance of the appearance of impropriety is as important in developing public confidence in the judicial system as avoiding actual impropriety and that the judge should take appropriate action to withdraw from a case in which the judge deems himself or herself biased or prejudiced. *Tennant* cited the commentary to former Canon 3E(1) which states that a judge should timely disclose on the record information which he/she believes the parties or their lawyers might consider relevant to the question of disqualification. Litigants and counsel should be able to rely on judges complying with the Code of

Judicial Conduct. There is no obligation imposed on counsel to investigate the facts known by the judge which could possibly disqualify the judge. The judge has a duty to disclose any facts even if the judge does not feel that they are grounds for disqualification *sua sponte*.

Tennant also addressed the rule that a judge has an equally strong duty to sit where there is no valid reason for recusal. In so doing, the Court set forth a balancing test between the two concepts. While giving consideration to the administration of justice and the avoidance of the appearance of unfairness, a judge must also consider whether cases may be unfairly prejudiced or delayed or discontent may be created through unfounded charges of prejudice or unfairness made against the judge. The Court noted that the standard for recusal is an objective one. Facts should be viewed as they appear to the well-informed, thoughtful and objective observer rather than the hypersensitive, cynical and suspicious person.

Meanwhile, Comment 3 to Rule 2.11 notes that the doctrine of necessity may override the rule of disqualification. The doctrine allows a judge who is otherwise disqualified from handling a case to preside if there is no provision that allows another judge to hear the matter. *Brown, supra*. Importantly, the doctrine should be used only sparingly. *Id.*

Based upon the foregoing, the Commission is of the opinion that given the time constraints, the fact that you are the only circuit judge in your circuit and the doctrine of necessity, you may arraign the defendant in this term. In the event that you do not voluntarily recuse yourself, you should disclose the fact that you were the prosecuting attorney at the time it is alleged that the prior convictions were obtained and notify the defendant that he/she is on notice of the potential conflict; and if the defendant wishes to seek your disqualification, he/she must file a written motion within 30 days pursuant to Trial Court Rule 17.01.

The Commission hopes that this opinion fully addresses the issues which you have raised. Please do not hesitate to contact the Commission should you have any questions, comments or concerns.

Sincerely,



Alan D. Moats, Chairperson
Judicial Investigation Commission